

National Republican Senatorial Committee

Stephen M. Hoersting
General Counsel

October 13, 2004

Lawrence M. Norton, Esquire
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AOR 2004-38

Re: Advisory Opinion Request

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437(f) (2004), we seek an advisory opinion on behalf of U.S. senatorial candidate George Nethercutt, and the Nethercutt for Senate committee (collectively, the "Nethercutt campaign"). In preparation for the possibility of one or more recounts arising from the 2004 Washington senatorial election, the Nethercutt campaign seeks the Commission's opinion as to how to comply with the prohibitions, limitations and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the "Act") and on Commission regulations in connection with the raising and spending of funds to be used to pay for recount expenses.

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DISCUSSION

Commission regulations state that a "gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply." 11 CFR § 100.91. A similar exemption from the definition of "expenditure" exists for recount expenses. 11 CFR § 100.151. In previous election cycles, federal candidates raised and spent funds in accordance with these regulatory requirements, either through a separate banking account established by the candidate's principal campaign committee or through a separate entity. *See* Advisory Opinions 1998-26 and 1978-92. If funds were raised through the candidate's principal campaign committee, then the reporting requirements for political committees also applied. *See* MUR 5199 and 11 CFR Part 104.

As a result of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), however, there is some uncertainty as to whether additional restrictions apply. BCRA prohibits candidates and entities established, financed, maintained or controlled by candidates from raising or spending funds "in connection with an election for Federal office" unless those

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funds are "subject to the limitations, prohibitions, and reporting requirements of the Act." 2 U.S.C. § 441i(e). Thus, it is unclear whether recount funds raised and spent in accordance with 11 C.F.R. §§ 100.91 and 100.151 would be in full compliance with BCRA.

In order to avoid any question of whether its recount funds comply with BCRA, the Nethercutt Campaign seeks the Commission's opinion as to how it may permissibly pay for recount expenses.

If permitted by the Commission, the Congressman Nethercutt and the Nethercutt campaign would establish and solicit donations for a recount fund under his control. Congressman Nethercutt would also (not alternatively) solicit recount funds for other organizations that conduct recounts, but are not established by him nor under his control. These organizations would include the non-Federal account of a State party committee; Internal Revenue Section 501(c) organizations; and Internal Revenue Section 527 organizations. The Nethercutt Campaign requests that the Commission provide guidance as to whether the regulations set forth in 11 C.F.R. §§ 100.91 and 100.151 governing recount expenses are an accurate reflection of the law in this area, and if not, which additional restrictions would apply.

When the phrase "subject to the prohibitions, limitations and reporting requirements of the Act" is applied to funds that do not fall within the definition of "contribution," the particular source and amount restrictions and reporting requirements that apply depend on the context. *See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule* 67 Fed. Reg. 49064, 49096-97 (2002). If the Commission were to conclude that 2 U.S.C. § 441i(e) applies to funds raised and spent pursuant to 11 C.F.R. §§ 100.91 and 100.151, what would that mean in practice? How would the receipts and disbursements need to be reported if the funds were not raised through a segregated bank account of the Nethercutt campaign? Which limitations of the Act would apply? Would the aggregate contribution limit for individuals apply, even though donations for recount expenses are explicitly excluded from the definition of "contribution"? Would there be any restrictions on joint fundraising?

Further, Congressman Nethercutt asks whether he may solicit funds on behalf of other recount entities not established by him and not under his control, that are not registered as political committees with the Commission under 2 U.S.C. 431(5), such as State party non-Federal accounts, or Internal Revenue section 501(c) and 527 organizations. BCRA Section 441i(e) prevents candidates from soliciting funds outside the limits, prohibitions and reporting requirements of the Act, yet the Commission has properly allowed Federal officeholders to solicit funds, in certain instances and with certain restrictions, on behalf of State candidates (Advisory Opinion 2003-03); non-Federal political organizations registered under 26 U.S.C. 501(c)(6) (Advisory Opinion 2003-05); and other non-Federal political organizations registered under 26 U.S.C. 527 (Advisory Opinion 2003-36).

The Commission has not yet imposed additional limitations, prohibition and reporting requirements on other types of post-election expenses incurred by federal candidates when the applicable statutory or regulatory provisions do not include all three restrictions. For example, the regulations that allow funds to be raised above and beyond presidential General Election Legal and Accounting Compliance fund contributions to pay for civil and criminal penalties apply the source prohibitions of the Act and the reporting requirements of 11 C.F.R. Part 104, but impose no amount limitation. *See* 11 C.F.R. § 9004.4(b)(4). Funds raised for an inaugural committee are subject to certain prohibitions and reporting requirements, but the Commission did not suggest in its recent Notice of Proposed Rulemaking that amount limitations be imposed as well. *See Inaugural Committee Reporting and Prohibition on Accepting Foreign National Donations, Notice of Proposed Rulemaking* 69 Fed. Reg. 18301 (April 7, 2004). In the absence of any clear indication as to how the Commission would apply 2 U.S.C. § 441i(e) to post-election expenses, any additional restrictions on recount funds would need to be specifically identified by the Commission.

The Nethercutt campaign believes that 2 U.S.C. § 441i(e) does not apply to funds raised and spent for recount or litigation costs that are incurred post-election. The Nethercutt campaign respectfully submits that Congress did not change the law with respect to recounts and election contests. Recounts and contests are not included in the definition of “election” in 2 U.S.C. § 431(1). As a result, the clause “in connection with an election for Federal office” in 2 U.S.C. § 441i(e) does not apply to recounts and contests.

Commission Advisory Opinions have long held that recounts and other litigation costs such as redistricting and legal defense funds are not subject to the Act.¹ The Commission has continued to adhere to this interpretation of the law post-BCRA. The Commission recently issued Advisory Opinion 2003-15 (“AO 2003-15”) which allowed a separate litigation expense fund for the purpose of defending against a lawsuit challenging Georgia’s open primary system.

AO 2003-15 provides the Commission’s most recent interpretation of the Act as it relates to federal officeholders. In this opinion, the Commission concluded that the open primary challenge lawsuit was not “in connection with a Federal election” and that, as a result, “donations to, and disbursements by, the Fund for the sole purpose of defending against this lawsuit are not subject to the limitations or prohibitions of 2 U.S.C. § 441a or 441c.” *Id.*

The Commission also determined in AO 2003-15 that 2 U.S.C. § 441i(e)(1)(A) does not change this longstanding interpretation of the Act. The Commission determined that the members of Congress who voted on BCRA were well aware of legal defense funds and did not intend to change the regulatory regime governing such funds. *Id.*

¹ *See Advisory Opinions* 1978-92 and 1998-26 (recount funds). As early as 1981, the Commission concluded that legal defense funds are not covered by the Act. *See Advisory Opinion* 1981-13. The Commission has more recently approved non-federal litigation funds to defend the sufficiency of nominating petitions. *See Advisory Opinion* 1996-39.

The Nethercutt Campaign urges the Commission to continue to interpret the Act in a manner consistent with longstanding interpretations of the law relating to recounts and contests. The Nethercutt campaign believes that 2 U.S.C. § 441i(e) does not apply to funds raised and spent for recounts, but if the Commission finds otherwise, we request that the Commission specify which additional restrictions, if any, would apply to the funds that would need to be raised to prepare for the possibility of a recount.

In order to ensure that all funds raised for any recount arising out of the Washington senatorial election are in compliance with any applicable restrictions under the Act, the Nethercutt Campaign requests a response from the Commission within 20 days, pursuant to 11 C.F.R. § 112.4(b).

Respectfully submitted,

/s/ Steve Hoersting

Steve Hoersting
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/s/ Tim McKeever

Tim McKeever
Counsel to the Nethercutt for
Senate Committee
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cc: Bradley A. Smith, Chairman
Ellen L. Weintraub, Vice Chair
David M. Mason, Commissioner
Danny L. McDonald, Commissioner
Scott E. Thomas, Commissioner
Michael E. Toner, Commissioner

National Republican Senatorial Committee

Stephen M. Hoerstring
General Counsel

October 15, 2004

Mr. Duane Pugh
Office of the General Counsel/Policy Division
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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2004 OCT 15 PM 3:47

Re: Advisory Opinion Request of Congressman George Nethercutt, and his authorized committee, Nethercutt for Senate.

Dear Mr. Pugh:

This responds to the questions you posed to me by telephone on Thursday, October 14, 2004.

1) You asked what the request means by "joint fundraising."

Response: The Nethercutt for Senate committee, and its candidate, Congressman George Nethercutt (collectively, the "Nethercutt campaign"), ask whether they may engage in joint fundraising activity if some or all of the proceeds of that fundraising ultimately finance recount activity. Specifically, the Nethercutt campaign would engage in joint fundraising activity as described in 11 CFR 102.17, which permits "political committees [to] engage in joint fundraising with other political committees or with unregistered committees or organizations." As such, the Nethercutt campaign asks if it may raise funds jointly with organizations unaffiliated with Nethercutt for Senate, as defined in 11 CFR 110.3. Specifically, may the Nethercutt campaign fundraise with the following types of organizations: other federal candidates, their authorized committees, or any campaign recount fund the Commission may permit; non-federal candidates and their committees organized under applicable State law; a non-Federal account of a State party committee; and any other organization, whether or not such organization is registered with the Federal Election Commission, that claims funding recounts as its purpose or one of its purposes?

The Nethercutt campaign also asks, that if the Commission permits the Nethercutt campaign to establish a recount fund, may the recount fund joint fundraise with the following types of organizations: other federal candidates, their authorized committees, or any campaign recount fund the Commission may permit; non-federal candidates and

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their committees organized under applicable State law; a non-Federal account of a State party committee; and any other organization, whether or not such organization is registered with the Federal Election Commission, that claims funding recounts as its purpose or one of its purposes?

2. You asked what the request means by solicitations for Internal Revenue Section 501(c) organizations. Does the request mean "general" solicitations, or "specific" solicitations?

BCRA section 441i(e)(4)(B) states that a candidate or officeholder "may make a solicitation explicitly to obtain funds for carrying out the activities described in clauses (i) and (ii) of section 301(20)(A) (2 U.S.C. 431(20)(A), also known as type-i and type-ii Federal Election Activity. The Nethercutt campaign is not asking the Commission whether it may make specific solicitations for Federal election activity.

The Nethercutt campaign is asking whether it may make solicitations generally for entities that engage in recount activity.

If the Nethercutt campaign mentioned the word "recount" while fundraising for a 501(c) organization engaged in recount activity, would that run afoul of 2 U.S.C. 441i(e)(4)(A)?

As stated in the Nethercutt campaign's request, the Commission has allowed candidates, officeholders and their agents to raise funds for non-Federal entities. *See* Advisory Opinions 2003-03; 2003-05, and 2003-36. Are there similar restrictions the Commission will apply to the Nethercutt campaign's solicitations on behalf of non-Federal entities that engage in recount activity?

Please contact me if you have any additional questions.

Respectfully submitted,

/s/ Steve Hoersting

Steve Hoersting
(202) 675-6034

cc: Lawrence Norton, General Counsel
Rosemary Smith, Associate General Counsel, Policy